Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MICHAEL C. HILL,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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68 pp

ISSUE PRESENTED

Whether or not principles of double jeopardy bar, under the Fifth Amendment to the United States Constitution and the common laws and statutes of the Commonwealth of Massachusetts, an appeal by the Commonwealth where the Commonwealth's highest court has previously ruled that, in a sexually dangerous person civil proceeding, principles of due process require that a finding by the trial court that a person is not presently sexually dangerous be considered a final judgment analogous to an acquittal in a criminal case.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the Supreme Judicial Court of the Commonwealth of Massachusetts are named in the caption.

TABLE OF CONTENTS

Page

Issue Presented.....i

Parties to the Proceedings.....ii

Table of Authorities.....iv

Opinion Below.....1

Jurisdiction of the Court.....2

Table of Rules, Statutes, and Regulations.....2

Proceedings Below.....9

Statement of the Case.....11

Argument for Granting the Writ.....16

The Court should grant certiorari in order to determine whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution permits the Commonwealth of Massachusetts to Appeal from a civil judgment which has been held to be analogous to a final judgment of acquittal in a criminal case.

Conclusion.....20

Record Appendix Table of Contents.....21

TABLE OF AUTHORITIES

CASES Page

Andrews, petitioner
368 Mass. 468 (1975).....13

Commonwealth v. Elder,
389 Mass. 743 (1983).....14

Commonwealth v. Travis,
372 Mass. 238 (1977).....13, 15, 17

Hill, Petitioner,
422 Mass. 147 (1996).....2, 11, 12

Lydon v. Commonwealth,
381 Mass. 356, *cert denied,*
449 U.S. 961 (1980).....17

North Carolina v. Pearce
395 U.S. 711 (1969).....16, 17, 19

Smalis v. Pennsylvania
476 U. S. 140 (1986).....17, 18

United States v. Ball
163 U.S. 662.....15, 18

United States v. Halper
490 U.S. 435 (1989).....16, 17

Page

United States v. Scott
437 U. S. 82 (1978).....18

STATUTES

Amendment 5,
Constitution of the United States.....14, 15, 18

Amendment 14,
Constitution of the United States.....13

28 United States Code §1257(a).....2

Declaration of Rights,
Massachusetts Constitution.....14

Mass. Stats 1993, c. 489 §7.....13

M. G. L. ch, 123A §1.....13

M. G. L. ch. 123A §9.....*passim*

M. G.L. ch. 211 §3.....11

M.G.L. ch. 231 §113.....15

M. G. L. ch. 263 §7.....14

M.G.L. ch. 278 §28E.....15

RULES Page

Supreme Court Rule 10 .1. (c).....2

Mass. Rules App. Proc. 11.....11

Mass. Rules Cr. Proc. 25 (c) (1).....15

Mass. Rules Cr. Proc. 30.....15

No.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL C. HILL, *PETITIONER,*
versus
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of the
Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

The petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, which was entered on February 23, 1996.

OPINIONS BELOW

The decisions of the Superior Court of Suffolk County are reproduced in the record appendix.[1] The decision of the Supreme Judicial Court of the

[1] RA 5 and RA 34. Reference to the record appendix are designated as RA__, followed by the page number.

Commonwealth of Massachusetts is reported at 422 Mass. 147 (1966) and is reproduced in the Record Appendix at RA 23.

BASIS FOR JURISDICTION

The decision of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 23, 1996. On May 24, 1996, Mr. Justice Souter enlarged the time within which to file an application for a writ of certiorari up to and including July 22, 1996. The Court's jurisdiction in invoked under 28 U.S.C. §1257(a) and Rule 10 .1.(c).

TABLE OF STATUTES, REGULATIONS AND RULES

CONSTITUTION OF THE UNITED STATES

Amendment Five

No person shall* * * be subject for the same offence to be twice put in jeopardy of life or limb;* * *
* * * nor be deprived of life, liberty or property, without due process of law;* * *

Amendment Fourteen

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person whin its jurisdiction the equal protection of the laws.

Title 28 United States Code §1257 State Courts; Certiorari:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where ...any title, right, privilege, or immunity is specially set up or claimed under the Constitution...

UNITED STATES SUPREME COURT RULE 10. Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: ....

(c) When a state court...has decided an important question of federal law which has not been, but should be settled by this Court...

DECLARATION OF RIGHTS OF THE COMMONWEALTH OF MASSACHUSETTS

Article XII. Regulation of prosecutions;

* * * And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

MASSACHUSETTS GENERAL LAWS

M. G. L. ch 123A. CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 1. DEFINITIONS

The following words and phrases when used in this chapter shall, except as otherwise provided, having the following meanings:....

"Sexually dangerous person", any person previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of sixteen years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

Section 9. PETITIONS FOR EXAMINATION AND DISCHARGE

Any person committed to the center shall be entitled to file a petition for examination and discharge once in every twelve months.Such petition may be filed by either the committed person, his parents, spouse, issue, next of kin or any friend. The department of mental health may file a petition at any time it feels a person is no longer a sexually dangerous person. A copy of any petition filed under this subsection shall be sent within fourteen days after the filing thereof to the department of the attorney general and to the district attorney for the district where the original proceedings were commenced. Said petition shall be filed in the district of the superior court department in which said person was committed. The petitioner shall have a right to a speedy hearing on a date set by the administrative justice of the superior court department. The hearing may be held in any court or any place designated for such purpose by the administrative justice of the superior court department.The hearing shall be conducted in the same manner as provided by the second paragraph of section five of this chapter. The Court shall issue whatever process is necessary to assure the presence in court of the committed person. The court shall order the petitioner to be examined by two qualified examiners, who shall be appointed by the commissioner of mental health, and who shall conduct examinations, including personal interviews, of the

person on whose behalf such petition is filed and file with the court written reports of their examinations and and diagnoses, and their recommendations for the disposition of such person. If such person refuses, without good cause, to be personally interviewed by a qualified examiner appointed pursuant to this section, such person shall be deemed to have waived his right to a hearing on the petition, and the petition shall be dismissed upon motion filed by the commonwealth. The qualified examiners shall have access to all records of the person being examined. The reports of the qualified examiners shall be available to the parole board to assist in future determinations on criminal sentences. In addition to the evidence admissible pursuant to section five, the updated annual report of the restrictive integration review board pursuant to section eight shall be admissible in a hearing under this section. The administrator of the center or his designee may testify at the hearing regarding the annual report and is recommendations for the disposition of the petition. Unless the court finds that such person remains a sexually dangerous person, it shall order such person to be discharged from the treatment center. Discharge from the center shall not operate to terminate the sentence given concurrently with the commitment, or any other unexpired sentence....

G.L. ch. 231 §113 . Appeal from final judgment of superior court, land court and housing courts

A party aggrieved by a final. judgment of the superior

court,...may appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the full court of the supreme judicial court.

G.L. ch. 278 §28E Appeals by Commonwealth
An appeal may be taken by and on behalf of the Commonwealth by the attorney general or a district attorney from the district court to the appeals court in all criminal cases and in all delinquency cases from a decision, order of judgment of the court (1) allowing a motion to dismiss an indictment or complaint, (2) allowing a motion to suppress evidence, or (3) denying a motion to transfer pursuant to section sixty-one of chapter one hundred and nineteen.
An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the superior court to the supreme judicial court in all criminal cases from a decision , order, or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, or (2) allowing a motion of appropriate relief under the Massachusetts Rules of Criminal Procedure.
An application for an appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial may be filed in the supreme judicial court by a defendant or by and on behalf of the commonwealth by the attorney general or a district attorney. If such application is denied or if such application is granted but the interlocutory appeal is heard by a single justice, the determination of the motion to suppress evidence shall be open to review by the full court after rial in the same manner and to the same extent as determinations of such

motions not appealed under the interlocutory procedure herein authorized.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those applicable to criminal appeals under the Massachusetts Rules of Appellate Procedure

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Mass. Rules of Crim. Proc. rule 25 (c) (1) The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

PROCEEDINGS BELOW

On October 9, 1979, the Plymouth County Grand Jury returned three indictments against the petitioner for rape, armed assault in a dwelling house and assault by means of a dangerous weapon (Ind. No. 73035-37). On February 29, 1980, he pleaded guilty to all three charges. With regard to the charge of rape, on June 6, 1980, he was found to be sexually dangerous and committed for one day to life at the Massachusetts Treatment Center at Bridgewater. He was sentenced to ten to fifteen years concurrently at the Massachusetts State Correctional Institution at Walpole on the charge of armed assault in a dwelling house; the charge of assault with a dangerous weapon was placed on file. The petitioner has completed his criminal sentence and is presently at the Treatment Center as a civil commitment.

On February 20, 1987, the petitioner filed, in the Plymouth County Superior Court, a petition for annual review, release, and discharge, pursuant to the provisions of G.L. ch. 123A §9 (Civil Action 87-293). On September 6, 1990, he again filed a petition for annual review, release, and discharge in the Plymouth Superior Court (Civil Action 90-1825B). On February 2, 1995, the Commonwealth filed a motion to consolidate the two cases, which was allowed without opposition, by the Superior Court on February 10, 1995. The consolidated cases proceeded in the Unified Session of the Superior Court under docket no. 90-1825B.

On May 22-23, 1995, the unified session of the Superior Court, sitting in Suffolk County (R. Malcolm Graham, J.), heard evidence on the petitioner's two consolidated motions. The Court issued Findings of Fact and Rulings of Law[2] and Order for Judgment on June 21, 1995[3]; but because of administrative and clerical oversight it was not docketed in the Plymouth Superior Court until August 1, 1995. The Order for Discharge issued on the same day and was received by the institution on August 2. [4]

Also on August 2, 1995, the Commonwealth filed a Motion for Reconsideration, which the Superior Court heard and denied on August 4, 1995. At the same time, the Superior Court issued, over objection, a Stay of Execution of the Order for Discharge for five days to allow the Commonwealth to proceed further.[5] The Commonwealth filed on the same day in the Massachusetts Appeals Court a Notice of Appeal from the judgment of the Superior Court and from the denial of its motion. [6] The Single Justice of the Appeals Court extended the stay of execution of the order for discharge and ordered the parties to brief the issues on an expedited schedule. [7]

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[2]RA 5.

[3]RA 4.

[4]RA 17.

[5]RA 18.

[6]RA 19

[7]RA 20.

On August 9, the petitioner filed a motion for relief from stay of execution under G.L. c. 211, §3, with the Single Justice of the Supreme Judicial Court for Suffolk County[8], which motion was denied on August 15, 1995 (Docket No. 95-0415). On August 29, 1995, the Commonwealth filed an application in the Supreme Judicial Court for direct appellate review, pursuant to Mass. R. App. Proc. 11. Direct Appellate Review was allowed on September 6, 1995. The Supreme Judicial Court entered its judgment and continued the stay pending further proceedings in the case and remanded it to the Superior Court for reconsideration on February 23, 1996. *Michael C. Hill, petitioner,* 422 Mass. 147 (1996). On May 24, 1996, Mr. Justice Souter allowed the petitioner's application for leave to enlarge time in which to file a petition for Writ of Certiorari up to and including July 22, 1996.[9] On July 1, 1996, the Associate Justice of the Superior Court, on remand, reversed his previous order and denied petitioner's motion for release under G. L. ch. 123A §9.[10]

STATEMENT OF THE CASE

On August 1, 1995, the Unified Session of the Superior Court of the Commonwealth of Massachusetts after a hearing pursuant to M. G. L. ch. 123A §9, entered a judgment that the Commonwealth had not sustained its burden of proof and had, thus,

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[8]RA 22

[9]RA 39

[10]RA 34

failed to prove beyond a reasonable doubt that the petitioner was presently a sexually dangerous person. Pursuant to its judgment and the provisions of M. G. L. ch. 123A § 9, the Court entered an order discharging him from the custody of the Massachusetts Treatment Center at Bridgewater. After its motion for reconsideration was denied, the Commonwealth appealed from both the judgment of the Superior Court, and from the denial of its motion, arguing that the judge made a mistake in the law as it applied to the case. The Supreme Judicial Court, after hearing, remanded the case to the Superior Court for reconsideration. Upon reconsideration, the Superior Court reversed itself and denied the petition.

The petitioner contends that the initial judgment of the Superior Court and the Order of Discharge were final judgments of acquittal and that the Commonwealth was barred from appealing, either directly or collaterally, from that judgment. By allowing the appeal the petitioner was placed in jeopardy a second time.

(a) The Petitioner's Conviction and Commitment

The facts upon which the petitioner's conviction and commitment are based are set forth in *Hill, petitioner*, 422 Mass. 147 (1996) and in the record appendix. [11]

(b) Judgments of the Superior Court on the Petition under M. G. L. ch. 123A §9

The findings of fact and rulings of law on which the Superior Court based, first, its determination that the

[11] RA

petitioner was no longer sexually dangerous and, then, its reversal of its original findings of facts and rulings of law are both set forth in the record appendix.[12]

(c) Sexually Dangerous Person Proceedings in Massachusetts

Sexually dangerous person proceedings in the Commonwealth of Massachusetts are involuntary, civil commitment proceedings whose procedure is governed by M. G. L. ch. 123A §§1 ff. M. G. L. ch. 123A §9 which provides a committed person with an annual review and hearing procedure by means of which he may petition the court for a finding that he is no longer sexually dangerous and for discharge. Section 9 release hearings are to be conducted according to the "procedures...which contemplate a full trial-type hearing at which both parties have full opportunity to present evidence and cross-examine witnesses." *Commonwealth v. Travis,* 372 Mass. 238, 250 (1977). Furthermore, "a person who stands to lose his freedom and to be labeled sexually dangerous is entitled to the benefit of the same stringent standard of proof as that required in criminal cases." *In re Andrews,* 368 Mass. 468, 488 (1975).[13]

The Supreme Judicial Court has also "conclude[d] that as a matter of fundamental fairness under the due

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[12]RA5 and RA 34.

[13]In addition, the legislature has recently granted petitioners under §9 the right to trial by jury, under the rules of civil procedure, on the issue of whether or not he is sexually dangerous. Mass. Stats. 1993, c, 489 §7.

process clause of the Fourteenth Amendment to the United States Constitution, a finding that an individual is no longer sexually dangerous must be as immune from subsequent or collateral attack as is a criminal judgment of acquittal." *Commonwealth v. Travis,,* at 249. This is the protection traditionally provided in criminal cases by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.[14] "While that clause is not strictly applicable to G.L. ch. 123A proceedings, we conclude that analogous protection is necessary in this context....However, our reasoning applies only to circumstances in which there has been a finding that an individual is not sexually dangerous at that particular time and a subsequent or collateral attack is made on that finding as it relates to the individual's status at the time the finding was made." *Travis,* at 249, note 5. "The not sexually dangerous finding is an unconditional adjudication of status at the time of the hearing, and as such may not be reevaluated in light of subsequent events." *Travis* at 250.

Under Section 9, when a person is adjudicated not presently sexually dangerous, he is to be discharged from the Treatment Center. There is no provision in

[14]The Declaration of Rights of the Constitution of the Commonwealth of Massachusetts does not have a double jeopardy clause, but the right to not be placed in jeopardy more than once is "part of the common law and statutory law of the Commonwealth." *Commonwealth v. Elder,* 389 Mass. 743, 746, note 4 (1983); See also M. G.L. ch. 263 §7 regarding acquittals.

the statute which allows the Commonwealth to appeal from that adjudication.[15]

(d) Decision of the Supreme Judicial Court

The petitioner argued that because (i) the Court had previously held in *Travis* that a judgment by the Superior Court was tantamount to an acquittal in a criminal court, and (ii) because such a judgment was barred from subsequent or collateral attack, the Commonwealth was barred from appealing the judgment. The petitioner further argued that the Commonwealth's appeal was tantamount to a second prosecution for the same offense after acquittal. *U.S. v. Ball,* 163 U.S. 662 (1895). Finally, petitioner argued that to allow the Commonwealth to appeal was violative of his right to substantive due process.

On appeal, the Commonwealth re-argued the same facts which the Superior Court had found insufficient. The Commonwealth also argued that the Superior (ie. trial) Court had made a mistake in its legal ruling with regard to the facts and asked the court to review the trial court's ruling.

The Supreme Judicial Court decided that the Double Jeopardy Clause was not implicated in the petitioner's case because M. G. L. ch 123A was not a punitive statute and its commitment sanctions could be explained in a nonpunitive way. [16]

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[15]The Commonwealth may appeal only in certain very limited circumstances. M. G. L. ch 278 §28E; M.G.L. ch 231 §113; M. R. Crim. Proc. Rules 25(c)(1) and 30.

[16]RA 27-30.

The Court further decided that because ch. 123A allows a person committed as a sexually dangerous person to annually challenge his commitment, and because, in any event, the proceedings are civil in nature, any due process rights he might have had would have been only with respect to his criminal commitment.[17]

ARGUMENT AS TO WHY THE COURT SHOULD GRANT THE PETITION

The Court should grant the petition for certiorari in order to determine whether the Double Jeopardy Clause of the Constitution permits the Commonwealth to appeal a civil judgment which has been held to be analogous to a final judgment of acquittal in a criminal case.

The petitioner concedes that M. G. L. ch. 123A is a civil statute but does not concede that it is nonpunitive. The issue before the Court is not one of sanctions but of procedure. It is a question of whether or not the Commonwealth should be allowed two bites of the apple.

The question is not what the effect of the statute would be if its commitment provisions are invoked after a finding that a petitioner is adjudicated to be sexually dangerous. Rather, the question is what are his rights when he is found to be not sexually dangerous and ordered discharged. Must he be continually subjected to further legal proceedings once such a judgment and discharge has entered.

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[17]RA 30-31.

The purpose of the proscription against double jeopardy is to protect against "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *U.S. v. Halper*, 490 U.S. 435, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Protection against the first of these abuses is that which is invoked in this case.[18]

"The theory of double jeopardy is that a person need run the gantlet only once....That risk having been faced once need not be faced again." *North Carolina v. Pearce*, 395 U.S. 711, 727 (1969) (Douglas and Marshall, JJ., dissenting).

Even though the proscription against double jeopardy contained in the Fifth Amendment to the Constitution of the United States "is not strictly applicable to G.L. ch. 123A proceedings, we conclude that analogous protection is necessary in this context." *Travis* at 249, note 5. And, "when the Double Jeopardy Clause is applicable, its sweep is absolute." *Lydon v. Commonwealth*, 381 Mass. 356, 365, *cert. denied*, 449 U.S. 961 (1980). quoting *Banks v. U.S.*, 347 U.S. 1, 11, note 6 (1978).

The petitioner is in the same position as a criminal defendant who has obtained a judgment of acquittal

[18]In *Halper*, the Supreme Court was concerned with the third of the protections, that is, the protection against multiple punishments for the same offense. *Pearce*, a criminal case in which the government sought to retry a defendant after acquittal, was concerned with the first of the proscriptions against double jeopardy.

due to the insufficiency of the evidence. Under such circumstances, a person could not be retried on the same evidence. "A judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 143 (1986). "If [a] judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot." *U.S. v. Ball*, 163 US 662, 670 1895).

Where, as here, the state court has mandated that the finding and judgment under the civil statute have the same force and effect of an acquittal under a criminal statute, the effect of the Commonwealth's attempt to appeal, either directly or collaterally, is to allow the Commonwealth to retry the same issues in another forum, namely the appeals court. Furthermore, reversal would translate, as it did here, into further proceedings on the same facts initially found to be insufficient. Such proceedings would also violate the Double Jeopardy Clause. *Smalis*, at 145. Finally, even if the acquittal resulted from an incorrect interpretation of the law, such a misinterpretation impacts only upon the accuracy of the determination. It does not alter the fact that the judgment is an acquittal. See. *United States v. Scott*, 437 U.S. 82, 98 (1978).

The Superior Court specifically found as a matter of law that "The Commonwealth has not proved its case beyond a reasonable doubt that Mr. Hill remains a

sexually dangerous person as defined in G.L. ch. 123A, and he is entitled to the relief he seeks."[19] If the Court allows the Commonwealth to appeal from that finding, it will, in effect, allow the Commonwealth another chance to try its case on the same evidence in another forum in the hope that the second forum will come to a conclusion more to its liking. This has been recognized as a vicious procedure. *North Carolina v. Pearce*, at. 734-35 (Douglas, J. dissenting, quoting *Hoag v. New Jersey*, 356 U.S. 464, 474, 475 (1958).).

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[19]RA 16.

CONCLUSION

For the Reasons set forth above, this Court should grant a writ of certiorari in order to determine whether the Double Jeopardy Clause of the Fifth Amendment to the Constitution permits the Commonwealth of Massachusetts to appeal a civil judgment which has been held analogous to a final judgment of acquittal in a criminal case.

Respectfully submitted,
MICHAEL C. HILL,
By his attorney
Melvin Norris

July 22, 1996

APPENDIX

RECORD APPENDIX TABLE OF CONTENTS

	Page
Petition for Discharge, CA 87-293.....RA	1
Petition for Discharge, CA 90-1825B.....	2
Judgment on Findings by the Court.....	3
Findings of Fact, Rulings of Law and Order for Judgment.....	5
Order for Discharge.....	17
Order for Stay.....	18
Notice of Appeal.....	19
Memorandum and Order.....	20
Motion for Relief from Stay.....	22
Hill, Petitioner 422 Mass. 147 (1996).....	23
Memorandum and Order.....	34
Letter re Enlargement of Time.....	39

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,SS SUPERIOR COURT

CA. 87-293

MICHAEL C. HILL,
Petitioner

v. February 20, 1987 (Volterra, J.)
Filed w.o. entry fee

COMMONWEALTH //S// P. Mary Farina
Respondent Asst. Clerk

Now comes the above referred to petitioner and moves herein, under the provisions of section 9 of Chapter 123A of the General Laws, for a hearing for examination and discharge from the Treatment Center at Bridgewater, Massachusetts.

The petitioner states herein that copies of said petition have been forwarded to the office of the District Attorney for the County of Plymouth, consistent with the terms of Section 9. The petitioner further states that he has not submitted a petition for annual review of his commitment to the Court for filling since April 29, 1985.

The petitioner is no longer a sexually dangerous person as defined in General Laws, chapter 123A, section 1, and should be released forthwith from the Bridgewater Treatment Center.

A TRUE COPY ATTEST Respectfully submitted,

6.17.94
Allowed as to hearing
ex parte /s/John P. Forte
RECEIVED Mar 22 1994

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CIVIL ACTION NO.
CA90-1825B

MICHAEL C. HILL, PETITIONER
V.
COMMONWEALTH,
RESPONDANT, [sic]

PETITION FOR ANNUAL REVIEW, RELEASE AND DISCHARGE

Now comes the above referred to petitioner and moves herin, under the provisions of Chapter 123A, Section 9, of the General Laws, for hearing for examination and discharge, including the right of a speedy hearing, from the Treatment Center at Bridgewater, Massachusetts.

The petitioner states herein that copies of said petition have been forwarded to the office of the Attorney General, and the Office of the District Attorney for the County of Plymouth, consistant [sic] with the terms of Section 9. The petitioner further states that he has not submitted a petition for annual review of his commitment to the court for filing since February 9, 1987.

The petitioner is "No longer a Sexually Dangerous Person" as defined in Chapter 123A, Section 1 of the General Laws, and should be released forthwith from the Bridgewater Treatment Center.

Respectfully submitted,

Michael C. Hill, Pro. se.
30 Administration Road
Bridgewater,Massachusetts 02324

Dated: September 1, 1990

5/23/95 Petition under Advisement,
Graham J.
Attest: Irwin R. Macey, Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT
CIVIL ACTION
CA87-923
No. CA90-1825

MICHAEL HILL, PLAINTIFF

vs.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT(S)

JUDGMENT ON FINDINGS BY THE COURT

This action came on for (hearing) before the court, Graham, J. presiding, and the issues having been duly (heard) and findings having been duly rendered, it is ORDERED and ADJUDGED as follows:

1. for reasons set out in the Court's Findings of Fact, Rulings dated June 21, 1995, it is Ordered and Adjudged: that Michael Hill's Petition for Discharge per G.L. c. 123A, Section 9 is Allowed.

Dated at Plymouth, Massachusetts, this first day of August 1995

FORM OF JUDGMENT APPROVED:

J. Michael Graham,
Associate Justice of the Superior Court

Francis R. Powers, Clerk By: John B. Deady
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. CRIMINAL ACTION
NOS.. 87-293
90-1825

MICHAEL HILL
vs.
COMMONWEALTH OF MASSACHUSETTS

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGEMENT

Michael Hill petitions this court pursuant to G.L. c. 123A, Sec. 9, to be discharged from the Massachusetts Treatment Center where he had been committed since May 1980. A hearing on this matter was held on May 21-22, 1995.

At the hearing, the Commonwealth offered testimony from two psychologists Cornelius Kiley, Ph.D. and Don Greif, Ph.D. and from the Chair of the Restrictive Integration Review Board (RIRB) and the Community Access Board (CAB), Uri Amit, Ed.D. The Commonwealth also introduced various items into evidence including a March 21, 1995 Annual Review of Treatment and Section 9 Report of a Community Access Board (CAB Report) and the March 21, 1995 Annual Review of Treatment and Section 9 Update of the Restrictive Integration Review Board (RIRB Report).[1] The petitioner offered testimony from Dr.

[1]The court also received (1) certified copies of Hill's convictions,

Ronald Steward, M.D.[2]

I. Mr. Hill's Motion In Limine to Exclude Dr. Uri's Testimony, the RIRB Report, and the CAB Report

Before this court addresses the merits of the hearing, it first decides Mr. Hill's argument concerning this court's consideration of the RIRB Report, CAB Report, and Dr. Amit's oral testimony. Mr. Hill moves to exclude this evidence on the ground that the statute that created the RIRB was repealed by St. 1993, c. 489, Section 5, effective April 14, 1994, and therefore, the RIRB is no longer an effective legal review board. Mr. Hill also submits that the admitted CAB Report is inadequate because it is identical in substance a (sic) the RIRB Report with the exception of the first page which is (sic) only omits the name of one person from the list of Board members.

The RIRB was created through the legislative enactment of St. 1985, c. 752, codified as G.L. c 123A, Section 8. ("the old statute"). The RIRB is made up of six persons appointed by the Commissioner of the Department of Mental Health ("DMH"). [3] According to the old statute,

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(2) Dr. Kiley's curriculum vitae and his April 7, 1995 Report of Qualified Examiner to the Court, (3) Dr. Greif's curriculum vitae and his April 5, 1995 Report of Qualified Examiner to the Court, and (3) Dr. Amit's curriculum vitae.

[2]The court also received Dr. Stewart's curriculum vitae and his Report to the court.

[3]These members include the head of the Treatment Center custodial staff, two Treatment Center clinicians, and three non-DOC employees of the Treatment Center, who may be consultants,

the function of the RIRB is to "evaluate patients at the restrictive integration program[4] and establish conditions to ensure the safety of the community." The RIRB has access to "[a]ll records concerning the progress, diagnosis and examinations of the person made by the qualified examiners" in order to assist the RIRB "in its determination of eligibility for restrictive integration." Under the old statute, the RIRB must prepare an annual report based (sic) its examination, including therein its findings and determination regarding the resident's status as a Sexually Dangerous Person (SDP).[5]

St. 1993, c 489 Sections 1-8 ("the new statute") was enacted in January 1994 and expressly repealed G.L. c 123A, Section 8, which created the RIRB. St. 1993, c. 489, Section 5. In place of the RIRB, the new statute formed a Community Access Board ("CAB") consisting of five members appointed by the Department of Corrections ("DOC").[6]

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and at least one of these three must be a licensed psychiatrist. The remaining two consultants can be licensed psychologists or licensed psychiatrists.

[4] Under section eight of the old statute, the restrictive integration program is a program at the center, designed by DMG, providing, "in a manner consistent with security considerations, for the restrictive integration of the patient into non-custodial environment."

[5]For the purposes of a G.L. c 123A hearing, the Board updates these annual findings and this updated report is admissible at the hearing. The testimony of the administrator or his designee regarding the annual report is likewise permitted at the hearing.

[6]The CAB is comprised of three DOC employees and two non

See G. L. c. 123A, Sections 1 & 6A as appearing in St. 1993, c. 489, Sections 1, 4. The new statute reads:

> The [CAB] shall evaluate residents for participation in the community access program[7] and establish conditions to ensure the safety of the general community. The [CAB] shall have access to all records of the person being evaluated and shall give a report of its findings including dissenting views, to the chief administrative officer of the center. Such report shall be admissible in any hearing under section nine of this chapter. The [CAB] shall also conduct annual reviews of and prepare reports on the current sexual dangerousness of all persons at the treatment center, including those whose criminal sentences have not expired. The reports shall be admissible in a hearing under section nine of this chapter.

G.L. c. 123A, Section 6A.

The new statute, in effect, takes the responsibility of the Treatment Center away from the DMH and gives it to the DOC.[8] A comparison of the new statute and old statute,

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DOC employees. The two DOC non-employees must be licensed psychiatrists or psychologists. G.L. c. 123A, Section 6A, as appearing in St. 1993 c. 489, Section 4.

[7] Under section one of the new statue (sic), the Community Access Program is "a program established pursuant to section [6A] which provides for a person's reintegration into the community."

[8] This is further evidenced by the fact that in April 1994, the legislature decided that the responsibility and authority for the Treatment. Center was to be removed from DMH and given to the Department of Corrections ("DOC"). G.L. c 123A, SECTION 2, AS

as it affects Mr. Hill, shows that while the name and the membership of the "reviewing board" has been changed, the function of CAB, does not dramatically differ from that of the RIRB. Both the old and the new statute provide for a board which shall review the progress of the resident to determine whether the resident is able to participate in a program which is designed to integrate him into society and to give its determination of the resident's SDP status. Both statutes provide that the board include such a determination in a report which is admissible at the petitioner's hearing under section nine.

At the time of Mr. Hill's review, the new statute had already been enacted, but the RIRB (or the DMH) was still in control of the Treatment Center. The reason that the DMH still controls the Treatment Center, and the reason that the new statute has not been fully implemented, is due to the existence of a federal consent decree which, among other things, mandates that the primary responsibility and authority for the Treatment Center be exercised by the DMH and that the DMH shall develop and implement a "Transition Program" for Treatment Center residents to participate in outside of the Treatment Center. Langston v. Johnston, 9238 F.2d 1206, 1227-1228 (1st Cir. 1991); Martel v. Fridovich, 14 F. 3d 1, 2-3 (1st Cir. 1993). Although the Commonwealth has properly requested that the federal

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APPEARING IN ST. 1993, 489, SECTION 2. Under the old statute, the DOC was only responsible for security in the treatment center while the DMH controlled care, treatment and rehabilitation of the residents. G. L. 123, Section 2 as appearing in St. 1985, c. 752, Section 1.

court modify the consent decree to properly reflect the changes that appear in St. 1993, c 489, Sections 1-8, at the time of Mr. Hill's review, the federal court had not yet ruled on the Commonwealth's request. Mitchell G. King v. Milton Greenblatt, C.A. No. 72-788-MA. Apparently recognizing the existence of the new statute and in an attempt to cover all bases, the CAB also convened to evaluate Mr. Hill. As indicated by the identical nature of the RIRB Report and the CAB Report, one board seemingly adopted the findings of the other. The only difference between the reports is the change of board membership. Taking into consideration all of these unique circumstances, this court cannot, as Mr. Hill suggests, consider the language of the new statute in a vacuum, but instead, must take into account the surrounding circumstances affecting the new statute's implementation. In light of the federal consent decree, if the RIRB ceases operation, without the CAB ready to legally assume its responsibility, there would be no evaluations afforded to the Treatment Center residents. While, pursuant to the new statute alone, the RIRB is no longer the correct reviewing body, this court will not construe the new statute as to deny all evaluation and treatment of the Treatment Center residents. To so construe the legislature's enactment is, in effect, to make St. 1993, c. 489 a nullity and to promulgate a decision causing the DMH and DOC to act in violation of the federal decree. Manning v. Boston Redevelopment Authority, 400 Mass. 444, 453 (1987)

This decision is proper in light of later legislative

enactments which favor that the RIRB stay in effect until the federal court has an opportunity act (sic) on the Commonwealth's request. The legislature's fiscal year 1995 appropriations act, St. 1994, c. 60, Section 2, appropriated money "for the administration and operation of the [new] correctional center; provided, that the [DOC] is hereby authorized to enter into an interagency agreement with the [DMH] to administer and operate said center, and for said purpose may transfer to the [DMH] not less than $4,131,111.00] (sic); and provided further, that the [DMG] shall administer and operate said center for as long as a court order requires." St. 1994, c 60, Section 2, item 8900-0100.

Finally, this court's decision to accept the testimony of Dr. Amit and both Reports is further buttressed by the fact that Mr. Hill alleges no prejudice or harm from the dual evaluation. He does not allege that the members of the (sic) either board alone would be better qualified to evaluate him. Given the nature of each Report, he does not suggest that his evaluation by one board was less favorable than a review by the other. Finally, since Mr. Hill exercised his right not to participate in the evaluation by either Board, he cannot now argue that he was not afforded a fair, unbiased evaluation by either board.

Accordingly, after a careful review of the new statute's language, the circumstances affecting its implementation, and the use of each review board in this particular case, Mr. Hill's Motion In Limine is DENIED.

II. THE G.L. c. 123A, Section 9 Petition and Hearing

The Commonwealth has the burden of proving beyond a

reasonable doubt that the petitioner remains a sexually dangerous person as defined in G.L. c. 123A, Section 1. Commonwealth v. Travis, 372 Mass. 238 (1977). Having decided that the testimony and both the CAB and the RIRB are properly before it, this court makes the following findings of fact and rulings of law considering all the evidence and with due regard to the credibility thereof, and drawing reasonable inferences therefrom.

FINDINGS OF FACT

Mr. Hill is 46 years old. On September 4, 1979, Mr. Hill committed rape, armed assault in a dwelling, and assault with a dangerous weapon. He was sentenced to ten to fifteen years for the crime of armed assault in a dwelling. The assault by means of a dangerous weapon was filed by order of the court. With respect to the rape conviction, Mr. Hill was found to be a sexually dangerous person; consequently, he was committed to the Treatment Center for one day to life. Mr. Hill has been a resident at the Treatment Center from May 1980 until present.

Mr. Hill participated in treatment programs at the Treatment Center from 1980 until 1987. For the next six years, he refused every form of therapy offered at the Treatment Center. In August 1994, Mr. Hill became minimally involved in psycho-educational classes and primary group therapy.

On April 7, 1995, Mr. Hill met with Dr. Kiley at the Treatment Center for the purposes of evaluation regarding his status as a sexually dangerous person. Mr. Hill immediately exercised his right not to speak with Dr. Kiley. Dr. .Kiley reviewed various Treatment Center records

pertaining to Mr. Hill and concluded that Mr. Hill continued to be a sexually dangerous person.

Dr. Kiley testified that his review of the records indicated that Mr. Hill has failed to attain certain treatment "milestones." This failure is in large part due to his lack of participation. Dr. Kiley thought Mr. Hill made some progress while in therapy between the years 1980 and 1987.[9] According to Dr. Kiley, Mr. Hill's recent involvement in psycho-educational classes and primary group therapy will further explore emotional and psychological factors contributing to the governing offense and allow Treatment Center officials to observe the resident's interaction. Dr. Kiley testified that Mr. Hill has gained some insight but failed, in his opinion, to meet the statutory requirements to no longer be a sexually dangerous person.

Dr. Greif also attempted to interview Hill at the Treatment Center. Upon Mr. Hill's decision not to participate in the interview, Dr. Greif also reviewed various Treatment Center Records. Based on this review, Dr. Greif believed Mr. Hill remained a sexually dangerous person.

Dr. Greif told the court that Mr. Hill's conduct, as indicated by his recorded history and other offenses, is repetitive and compulsive. Dr. Greif testified at length about these finding with regard to Mr. Hill's past conduct. There was, however, no current information available to Dr.

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[9] Dr. Kiley stated that progress was demonstrated by Mr. Hill's: (1) admitting to committing the governing offense, (2) admitting that other offenses were sexually motivated, and (3) showing a willingness to share secrets.

Greif on which to base these findings.

Dr. Amit testified that Mr. Hill refused to be interviewed by the RIRB Board and the CAB Board. Nonetheless, each Board made an assessment of Mr. Hill's sexual dangerousness based on Treatment Center records. Dr. Amit stated that the Board found that Mr. Hill's conduct, based on past documented behavior, was moderately repetitive. Dr. Amit testified that Mr. Hill has made negligible progress in therapy due to this failure to participate and that nothing in the documentation indicated that Mr. Hill has an initial understanding of the governing offense that he has developed a plan "not to reoffend."

Dr. Ronald Steward testified on behalf of Mr. Hill. He, too, reviewed various documents pertaining to Mr. Hill's admission and progress at the Treatment Center. He also interviewed Mr. Hill and later received a letter from Mr. Hill. Based upon all of these factors, Dr. Steward opined that Mr. Hill was no longer sexually dangerous. Despite his ability to form an ultimate conclusion on the matter, Dr. Steward has little to no experience in Sexual Danger Persons evaluation under G. L. c. 123A, Section 9.[10] Nonetheless, even if this court were to find Dr. Steward's expertise adequate, it does not find his testimony credible or persuasive and does not consider it in the following rulings and order.

Rulings of Law

In this proceeding, the Commonwealth bears the burden of proving beyond a reasonable doubt that Mr. Hill

[10] Dr. Steward told the court that he thought he may have done a G.L. c 123A Section 9 evaluation once before.

continued to be a sexually dangerous person within the meaning of G.L. c 123A, Section 1. Andrews, petitioner, 368 Mass. 468, 489 (1975). S "sexually dangerous person" is any person previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual aggression against any victim under the age of sixteen years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.
G.L. c. 123A, Section 1.

This court finds the present case similar to Page v. Commonwealth, 13 Mass. App. Ct. 384 (1982) to the extent that there is insufficient evidence from which to conclude that the petitioner continued to suffer from a "general lack of power to control his sexual impulses...and...as a result [would be] likely to attack or otherwise inflict injury on the object s of his uncontrolled or uncontrollable desires." Id. Each of the Commonwealth's witnesses found Mr. Hill to be a sexually dangerous person at present. However, given the paucity of present-day information, each witness had substantial difficulty in describing a clinical basis for linking present behavior to past sexual misconduct. See Poulin, petitioner, 22 Mass. App. Ct. 988., 989 (1986).

Most notably, here like in Page, there is no evidence of recent sexual misconduct. Mr. Hill was convicted of one offense for rape and it is the only criminal record of sexual misconduct. There is no present recording of any sexual misbehavior. "Evidence of past sexual misconduct,

standing by itself, will not support a finding of sexual dangerousness which will justify an original commitment under [G.L. c. 123A...and any such ruling] would only render illusory the right to recurrent review which is offered by Section 9... but also destroy the constitutional underpinnings of [the statute]. Page, 13 Mass. App. Ct. at 397.

In light of the foregoing, the Commonwealth has not provided its case beyond a reasonable doubt that Mr. Hill remains a sexually dangerous person as defined in G. L. c. 123A, and he is entitled to the relief he seeks.

ORDER FOR JUDGEMENT

For the above reason, the court hereby ORDERS that Michael Hill's petition for discharge per G. L. c. 123A, Section 9, is ALLOWED.

R. Malcolm Graham
Justice of the Superior Court

Dated: June 21, 1995

DISCHARGE FROM MASSACHUSETTS TREATMENT CENTER
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUFFOLK SUPERIOR COURT

RE: PETITION FOR DISCHARGE UNDER C.. 123(A) §9

PETITIONER: MICHAEL C. HILL PLYMOUTH COUNTY

NO. 90-1825B

ORDER FOR DISCHARGE

The Court, having determined that the above-named Petitioner is no longer Sexually Dangerous, as defined by law, now orders that the said Petitioner be discharged from custody on this case.

R. Malcolm Graham, J.
Attest: Joseph M. Rubino:
Assistant Clerk

DATE: August 2, 1995

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
NOS. 87-293 AND 90-1825B

MICHAEL HILL, PETITIONER,
VS.
COMMONWEALTH,

ORDER

Notwithstanding the prior order of this Court ordering that the said Petitioner Michael Hill is determined to be no longer sexually dangerous, the Court now orders that any order of discharge be stayed for 5 days pending further order of the single justice of its Appeal.

By the Court
R. Malcolm Graham, Associate Justice

Attest: Marybeth Brady, Assistant clerk

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. SUPERIOR COURT
NO. CA87-293
CA90-1825

MICHAEL HILL

vs.

COMMONWEALTH OF MASSACHUSETTS

NOTICE OF APPEAL

Now comes the Commonwealth in the referenced case and appeals from the judgment of the Superior Court allowing the petition for discharge and denying the motion for reconsideration.

Respectfully submitted,
For the Commonwealth
SCOTT HARSHBARGER
ATTORNEY GENERAL

Pamela L. Hunt
Assistant Attorney General
Chief Appellate Division
One Ashburton Place
Boston, Ma 02108
(617) 727-2200
BBO # 244520

Dated: August 4, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served in hand on counsel for petitioner, Joan Stanley, Esq., on this 4th day of August, 1995.

/s/ Pamela L. Hunt
Pamela L. Hunt

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

95-J-606

IN RE: PETITION OF MICHAEL C. HILL.

MEMORANDUM AND ORDER

On the basis of the parties' filings and the arguments of counsel, I find and rule as follows on the Commonwealth's motion for a stay pending appeal of the order of the Superior Court of August 1, 1995.

The motion is correctly before me, Rule 6(a), Mass. R.A.P., as the Superior Court judge has denied reconsideration of his original order and declined to stay his order pending appeal. Whether the Superior Court order is appealable and, if so, whether the appeal has merit are issues worthy of appellate consideration. See Petition of Swanson, 403 Mass 1004 (1988). In addition, the Commonwealth's stated public safety concerns and the risk of loss of jurisdiction if a stay is denied are, at least on their face, plausible considerations in support of the present motion.

For the foregoing reasons, the Commonwealth's motion for a stay of the Superior Court's order of August 1, 1995, pending appeal, is allowed. The parties shall proceed according to the following schedule:

The Commonwealth is to file a notice of appeal forthwith if it has not already done so. The appeal is entered this date as A.C. 95-P-1358. The necessity for assembly of the record is waived. The Plymouth Superior Court Clerk's

Office is to forthwith transmit two attested copies of the docket sheet in this matter. All further filings in this matter will be under case no. A.C. 95-P-1358.

The Commonwealth is to file and serve its brief and appendix on or before September 1, 1995. Appellee shall file and serve his brief on or before September 25, 1995. The matter is placed on the October 1995 list for oral argument. No enlargements or continuances will be granted.

Petitioner Hill's motion for an award of costs and attorney's fees is denied.

So ordered.
By the Court (Flannery, J.),

Lena M. Wong
Assistant Clerk

Entered: August 9, 1995

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
DOCKET NO.

Petition of MICHAEL HILL

MOTION FOR RELIEF FROM STAY OF EXECUTION OF ORDER OF DISCHARGE (G. L. ch 211 §

Now comes the Petitioner in the above-entitled case and, pursuant to G L. ch. 211 §3 moves this Honorable Court for relief from a stay of execution of the Order of Discharge granted this day by the Justice of the Massachusetts Appeal Court.

The Petitioner has requested a hearing before the full panel of the Appeals Court and has been informed that such is not possible at the present time.

The petitioner relies on the documents submitted to the Single Justice of the Appeals Court (Docket No. 95-J-606) which are attached hereto, incorporated herein and made a part hereof by reference, and other documents necessary to complete the record.

Respectfully submitted,
MICHAEL HILL
By his Attorney,

Joan C. Stanley
18 Tremont Street, Suite 601
Boston, Massachusetts 02108
(617) 523-1987
BBO No. 476640

August 9, 1995

MICHAEL C. HILL, petitioner.

Plymouth. January 10, 1996. - February 23, 1996.

Present: LIACOS, C.J., ABRAMS, LYNCH, O'CONNOR, & FRIED, JJ.

Sex Offender. Practice, Civil, Sex offender. *Evidence,* Sex offender. *Constitutional Law,* Double jeopardy, Sex offender. *Due Process of Law,* Sex offender.

Where proceedings against a sexually dangerous person pursuant to G. L. c. 123A are not punitive in nature, principles of double jeopardy are not implicated so as to preclude an appeal by the Commonwealth under G. L. c. 231, § 113, from a Superior Court judge's determination that a petitioner seeking release from his commitment was no longer a sexually dangerous person: the Commonwealth may properly seek appellate review of such a determination before the judgment becomes final. [151-155]

In the circumstances of a hearing on petitions for release from commitment as a sexually dangerous person, pursuant to G. L. c. 123A, § 9, the matter was remanded for reconsideration of the evidence in light of the petitioner's refusal to be examined for the hearing and his refusal to participate in treatment, as that bears on the Commonwealth's burden of proof. [156-157]

PETITIONS filed in the Superior Court Department on February 20, 1987, and September 6, 1990, respectively.

The cases were consolidated and heard by *Robert Malcolm Graham*, J., and a motion for reconsideration was heard by him.

A motion for stay of release filed in the Appeals Court was heard by *J. Harold Flannery*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Pamela L. Hunt, Assistant Attorney General, for the Commonwealth.

Joan C. Stanley for the plaintiff.

FRIED, J. The Commonwealth appeals from a Superior Court judge's determination that the petitioner, Michael C. Hill, is no longer a sexually dangerous person (SDP). We

must determine whether the Commonwealth has a right to appeal from this determination, and, if it does, whether the Superior Court's decision was erroneous.

I

During the early morning hours of September 4, 1979, Hill, armed with a knife, broke into the house of a former girl friend's sister. He put a pillow case over her face, undressed her, fondled and raped her, having threatened her children if she resisted. In 1980 the petitioner pled guilty to rape, armed assault in a dwelling, and assault by means of a dangerous weapon. He was sentenced to a prison term of from ten to fifteen years for the armed assault in a dwelling, which has since expired. The assault by means of a dangerous weapon was filed by order of the court. With respect to the rape conviction the Superior Court held a G. L. c. 123A, § 5 (1988 ed.) hearing, determined the petitioner to be an SDP, and committed him to the treatment center of the sexually dangerous (treatment center) for one day to life. In 1987 and 1990 the petitioner filed petitions for release pursuant to G. L. c. 123A, § 9 (1988 ed.). The appeals were consolidated and heard during a two-day period in May of 1995 (section nine hearing).

The Superior Court judge found the following facts at the section nine hearing. For the first seven years at the treatment center, the petitioner participated in the treatment program. Then, in 1987 and for the next six years, he "refused every form of therapy offered at the Treatment Center." In August, 1994, he became "minimally involved" in therapy once again.

At the hearing, the Commonwealth presented two qualified examiners,[1] Doctors Kiley and Greif, and their reports. Kiley and Grief had both attempted to interview and examine the petitioner for the purpose of evaluating him with regard to his status as an SDP, but the petitioner had refused to speak to either of them. Both doctors then reviewed the petitioner's treatment center records and concluded that the petitioner remained an SDP as defined by statute. Although Dr. Kiley found that the petitioner had made some progress while he

[1]"Qualified examiner" is defined in G. L. c. 123A, § 1 (1994 ed.).

was participating in therapy,[2] he recognized that the petitioner had failed to meet certain treatment "milestones" due to his refusal to participate in the therapy from 1987 to 1994. In his testimony Dr. Greif characterized Hill's sexually dangerous conduct as repetitive and compulsive. He based this opinion on the petitioner's past conduct and social history.[3] The Superior Court judge noted, however, that there was "no current information available to Dr. Greif on which to base these findings."

The Commonwealth also presented Dr. Uri Amit, the chair of the restrictive integration review board/community access board (review board),[4] to speak on behalf of the review board and to explain its report.[5] The Legislature established the

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[2]Dr. Kiley stated that the petitioner's progress was evidenced by his: (1) admitting to committing the governing offense; (2) admitting that other offenses were sexually motivated; and (3) showing a willingness to share secrets.

[3]As a basis for this determination, Dr. Greif considered the petitioner's governing offense, criminal history (including charges of lewd and lascivious behavior and attempted breaking and entering where the petitioner reported that he intended to rape the person in the dwelling), personal history (including rape fantasies), and the petitioner's progress since commitment.

[4]In 1993, the Legislature enacted a statute that created the community access board (CAB) and expressly repealed the statute that created the restrictive integration review board (RIRB). See St. 1993, c. 489, §§ 1-8. The effect of this action was to shift control of this review board and the treatment center from the Department of Mental Health (DMH) to the Department of Correction. Compare St. 1985, c. 752, § 1, codified as G. L. c. 123A, § 8, with G. L. c. 123A, §§ 1 & 6A. The petitioner's section nine hearing occurred after the Legislature had repealed the statute that created the RIRB, but before the new statute creating the CAB had been fully implemented due to the existence of a Federal consent decree that required that primary responsibility for the treatment center be exercised by the DMH. See *Langton* v. *Johnston*, 928 F.2d 1206, 1227-1228 (1st Cir. 1991). Modification of the consent decree had not occurred at the time of Hill's hearing, thus the DMH still controlled the treatment center and the review board.

[5]Prior to the evidentiary hearing, the petitioner sought to exclude the testimony of the chair of the restrictive integration review board (RIRB)/community access board (CAB), and his reports as unauthorized by law because, by statute, the board no longer existed, and its successor had not become authorized by law. See note four above. The Superior Court judge denied this request. The petitioner challenges this decision on appeal. Although the petitioner did not take a cross appeal from the Superior Court judgment, because we remand this case we note our agreement with the

board to review annually the progress of each person adjudicated an SDP, to determine whether each person is able to participate in a program designed to integrate him into society, and to evaluate each person's status as an SDP. See G. L. c. 123A, § 8 (1986 ed.); G. L. c. 123A, § 6A (1994 ed.). By statute, the reports generated by the review board are admissible in a section nine hearing. *Id.* The petitioner refused to be interviewed by the board. Nonetheless, Dr. Amit testified that the board had also determined that the petitioner remained an SDP. The board found that the petitioner's conduct tended to be repetitive and that the petitioner had made negligible progress in therapy due to his failure to participate in recent years.

The petitioner offered his own expert, Dr. Ronald Stewart. Dr. Stewart interviewed the petitioner, received a letter from him, and reviewed the relevant treatment center's documents. Dr. Stewart opined that the petitioner was no longer an SDP. The hearing judge declined to consider Dr. Stewart's testimony, finding that Dr. Stewart had little or no experience in SDP evaluations and that, even if he were to rule Dr. Stewart was qualified, his testimony was neither credible nor persuasive.

The hearing judge held that the Commonwealth had not carried the burden of establishing that the petitioner is currently an SDP beyond a reasonable doubt. Relying primarily on *Page* v. *Commonwealth*, 13 Mass. App. Ct. 384 (1982), the judge cited the absence of evidence of recent sexual misconduct as the basis for his determination. Although each of the Commonwealth's witnesses found the petitioner to be an SDP at present, the judge discounted these findings because, "given the paucity of present-day information, each witness had substantial difficulty in describing a clinical basis for linking present day behavior to past sexual misconduct." The Commonwealth then moved for reconsideration, and it was denied. It then filed an appeal under G. L. c. 231, § 113 (1994 ed.), from both the denial of the motion for reconsideration and

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reasoning of the Superior Court judge in his memorandum and order of June 21, 1995, on this issue. The anomalous legal situation of the review board at the time of the petitioner's section nine hearing did not deprive its judgments and conclusions of all relevance and persuasive force on the issues it addressed, and the petitioner has alleged no prejudice as a result of the peculiar status of the review board.

the underlying order and obtained a stay of release from a single justice of the Appeals Court. The petitioner sought review of the stay by a single justice of this court. The single justice declined to vacate the stay, and this court granted direct appellate review. We now reverse the judgment of the Superior Court and remand the case to that court for further proceedings. Pending the outcome of such proceedings the order of the single justice of the Appeals Court staying the petitioner's release remains in effect.

II

A

The Commonwealth asserts a right to appeal under G. L. c. 231, § 113 (1994 ed.). Section 113 states that "[a] party aggrieved by a final judgment of the superior court . . . may appeal therefrom." We specifically left open the issue of the Commonwealth's right to appeal a G. L. c. 123A determination in *Swanson, petitioner*, 403 Mass. 1004 (1988).[6] In that opinion we referred to the prohibition against double jeopardy and due process concerns as possibly restricting the Commonwealth's right to appeal a G. L. c. 123A determination. *Id.* The petitioner now challenges the Commonwealth's right to appeal on those grounds.[7]

The petitioner's challenge proceeds from the premise that because the Legislature and the courts have required significant procedural protection in a c. 123A proceeding, see, e.g., G. L. c. 123A, § 5 (1986 ed.) (notice and right to counsel); *Commonwealth* v. *Travis*, 372 Mass. 238, 246-251 (1977) (imposing procedural safeguards); *Andrews, petitioner*, 368 Mass. 468 (1975) (requiring proof of dangerousness beyond a reasonable doubt); *Gomes* v. *Gaughan*, 471 F.2d 794, 799-800 (1st Cir. 1973) (imposing procedural safeguards), the prohibi-

[6]There is no distinction between the initial section five hearing and the periodic review hearing pursuant to section nine.

[7]In *Commonwealth* v. *Barboza*, 387 Mass. 105, 115, cert. denied, 459 U.S. 1020 (1982), we held that an initial c. 123A hearing did not place a petitioner at risk of double jeopardy because the "issues before the court and the evidence presented were entirely different in the two proceedings." See also *Commonwealth* v. *Dagel*, 345 Mass. 539, 541, cert. denied, 375 U.S. 863 (1963). In contrast, the petitioner here argues that an appeal from a section nine hearing may subject him to a second prosecution for the same offense.

tion against double jeopardy, as an aspect of due process, also applies. But that conclusion does not follow. How much and what process is due is a function of the gravity of the consequences that government decision making may visit on those subject to it, and not of any rubric under which that decision may fall. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). A government may deprive a person of his liberty, and this calls for procedures that offer considerable assurance against erroneous decisions and the fullest opportunity to challenge what government seeks to do. *Id.* at 339-349. See also *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Such safeguards satisfy not only the heightened need for accuracy when so much is at stake, but also the related but distinct need to assure a person subject to government power that he has not been a mere passive object of an inquiry, however thorough, but an equal participant whose voice has fully been heard. These concerns are fully respected in 123A hearings where the Commonwealth bears the burden of proof beyond a reasonable doubt, and the subject has the right to the assistance of counsel and ample rights of confrontation. But the prohibition against double jeopardy, like the privilege against self-incrimination, the right to indictment by a grand jury, and trial by a petit jury, is not a necessary means for assuring either this accuracy or participation. Rather, these protections are historically based safeguards against the misuse of government power in the particular context of proceedings leading to specifically criminal sanctions. See *Allen* v. *Illinois*, 478 U.S. 364, 375 (1986) (discussing role of the privilege against self-incrimination); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (discussing role of jury); *Hurtado* v. *California*, 110 U.S. 516 (1884) (discussing role of grand jury); *United States* v. *Hogan*, 712 F.2d 757 (2d Cir. 1983) (same). See also *Commonwealth* v. *Barboza*, 387 Mass. 105, 113, cert. denied, 459 U.S. 1020 (1982) (discussing role of double jeopardy). Both our decisions and those of the Supreme Court of the United States have consistently recognized that these historical safeguards do not apply except where criminal punishment may be imposed, even if the consequence for the subject of the proceeding may be as, or more severe, than some criminal sanctions. See, e.g., *Slochower* v. *Board of Higher Educ. of New York City*, 350 U.S. 551 (1956) (discharge from public employment); *Helvering* v. *Mitchell*, 303 U.S. 391 (1938)

(acquittal on charge of tax evasion does not bar assessment and collection of additional tax); *Sullivan* v. *Commonwealth*, 383 Mass. 410 (1981) (civil paternity action); *Arthurs* v. *Board of Registration in Medicine*, 383 Mass. 299 (1981) (revoking license to practice a profession). Nevertheless, it is also clear that whether the protection of double jeopardy applies cannot be allowed to be a matter of labels, lest that protection be conjured away by terminological sleight of hand. *United States* v. *Halper*, 490 U.S. 435, 446-449 (1989). Whether a consequence visited upon an individual constitutes criminal punishment, therefore, must depend on an analysis of the nature, purposes, and context of that imposition. We have very recently conducted an exhaustive survey of our own and the Federal authorities on this issue and set forth a detailed analysis of when a consequence should be considered punishment for purposes of the prohibition against double jeopardy. *Luk* v. *Commonwealth*, 421 Mass. 415 (1995). We concluded that "[c]ivil sanctions are punishment only if they cannot be explained without reference to a retributive or deterrent purpose. Double jeopardy is not implicated if the sanctions can be entirely explained by a nonpunitive purpose." *Id.* at 422.

In *Barboza*, *supra* at 111-113, we considered whether G. L. c. 123A proceedings were punitive in nature with respect to the right to a trial by jury. We held that they were not.

> " 'General Laws c. 123A is a comprehensive legislative program designed to identify and treat sexually dangerous persons. The statute was enacted "with the dual aims of protecting the public against future antisocial behavior by the offender, and of doing all that can be done to rehabilitate him." *Commonwealth* v. *Rodriguez*, [376 Mass. 632, 646 (1978)].' *Commonwealth* v. *Knowlton*, [378 Mass. 479, 483 (1979)]. 'The statute . . . does not intend punishment and does not in terms impose it, and nothing therein justifies punitive treatment or confinement under any prison conditions, except such as are reasonably required for security. . . . Indeed, implicit in the statute and its purpose is the obligation to provide an environment conducive to a cure or an alleviation of the dangerous trait' (citations omitted). *Commonwealth* v. *Major*, 354 Mass. 666, 668 (1968), cert.

> denied, 393 U.S. 1109 (1969). 'Both the Massachusetts court and legislature have made considerable effort to differentiate between the treatment of the sexually dangerous, on the one hand, and the penalizing of criminals on the other.' *Gomes* v. *Gaughan*, 471 F.2d 794, 800 (1st Cir. 1973)."

Barboza, *supra* at 111-112. See also *Allen*, *supra* (holding that the Fifth Amendment right against self-incrimination does not apply in commitment proceedings for the sexually dangerous because the proceedings are not punitive); *Sheridan, petitioner*, 412 Mass. 599, 604 (1992) ("primary objective of c. 123A . . . is to care for, treat, and, it is hoped, rehabilitate the sexually dangerous person, while . . . protecting society"). Our analysis in *Barboza*, *supra*, of the nature of a 123A proceeding is equally applicable to the issue of double jeopardy.

Commitment to the treatment center and the treatment an SDP receives there is intended to provide an SDP with an opportunity to overcome his "general lack of power to control his sexual impulses" so that he can successfully reenter society. It does not serve as an additional punishment or deterrent measure. In fact, the statute provides an avenue for persons to request commitment to the treatment center. G. L. c. 123A, § 6A. Perhaps most significantly, G. L. c. 123A, § 9, permits an SDP to petition for release every year, and at each hearing the Commonwealth must prove beyond a reasonable doubt that the person is still sexually dangerous. See *Andrews, petitioner*, *supra* at 478-488. See also *Travis*, *supra* at 248 (holding that person may be recommitted only if it is established that he continues to be sexually dangerous). Thus, unlike a criminal prisoner, the SDP is continuously evaluated to determine if treatment is necessary, and, if not, the petitioner will be released from the treatment center, either to serve out his sentence in a correctional institution or to return to society if his sentence has expired.

The petitioner argues that, quite apart from the specific protection of double jeopardy, his rights as embodied in the concept of substantive due process prevent the Commonwealth from appealing the hearing judge's finding that he

is not sexually dangerous.[8] " 'So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937).' *United Sates* v. *Salerno*, 481 U.S. 739, 746 (1987)." *Aime* v. *Commonwealth*, 414 Mass. 667, 673 (1993). In *Commonwealth* v. *Travis*, 372 Mass. 238, 246-251, (1977), we ruled that a person who has been adjudicated no longer an SDP and conditionally released, cannot be recommitted as an SDP on the sole basis that he has breached the conditions of his release. Rather he must be readjudicated an SDP under G. L. c. 123A, §§ 5 and 6. In the course of our analysis, we stated that "as a matter of fundamental fairness under the due process clause . . . a finding that an individual is no longer sexually dangerous must be immune from subsequent or collateral attack as is a criminal judgment of acquittal." *Id.* at 249. See *Commonwealth* v. *Purdy*, 408 Mass. 681, 685 (1990) (substantive due process requires some degree of finality). By this passage, we were referring to attacks on a judgment that a person is no longer sexually dangerous after that judgment had become final. Due process in this context implies an aspect of constitutionally compelled res judicata. In *Travis*, *supra*, the Commonwealth was attempting to recommit an individual after the issue of sexual dangerousness had been decided by a Superior Court judge and the time for appeal had run. In this case, allowing an appeal not only occurs before the judgment is final, but also comports with our sense of ordered liberty. The statute allows an SDP to continually challenge his status as sexually dangerous, while the Commonwealth may assure the legal correctness of each such adjudication by invoking appellate review. This is particularly appropriate where the right to a trial by jury is not implicated and the appellate process does not trench on a jury's historic preserve. See *Barboza*, *supra* at 112-113 (no constitutional right to a trial by jury in section nine cases, although recent amendment to § 9 allows for a jury trial option, St. 1993, c. 489, § 7).

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[8]Procedural due process is not an issue in this appeal. The petitioner has been afforded all the procedural due process that the statute and this court have required.

B

The Commonwealth argues that the Superior Court judge committed an error of law in concluding that the petitioner was no longer an SDP, because the judge required monwealth to provide current psychiatric informat the petitioner's status. The Commonwealth bears th of establishing beyond a reasonable doubt that the continues to be an SDP at the time of the section n ing. See *Andrews, petitioner, supra* at 484-486; *Page*, 386-387. An SDP is "any person whose misconduct matters indicates a general lack of power to control h impulses, as evidenced by repetitive or compulsiv misconduct by either violence against any victim, o sion against any victim under the age of sixteen ye who, as a result, is likely to attack or otherwise infli on such victims because of his uncontrolled or uncon desires." G. L. c. 123A, § 1 (1994 ed.) Weighing and ing the testimony are for the trier of fact, and we substitute our judgment for that of the trier of fact *monwealth* v. *Walsh*, 376 Mass. 53, 58 (1978). Never we will scrutinize the propriety of the legal criteria em by the hearing judge and the manner in which those are applied to the facts.

The hearing judge, relying on *Page*, *supra*, requir Commonwealth's experts to present a "clinical basis fo ing present behavior to past sexual conduct." The ci stances in *Page*, however, were different. In *Page*, the h judge gave no indication that the petitioner was anythi forthcoming in his examinations; yet the Commonwe experts were unable to muster any evidence that the petitioner was still an SDP. In fact, the experts in *Page* testified that in their opinion the petitioner was no longer sexually dangerous, and yet the hearing judge found the petitioner to be an SDP. The Appeals Court justice reversed the determination of the Superior Court judge, reasoning that the hearing judge overlooked the fundamental principles of a section nine determination, particularly that the petitioner must be found sexually dangerous at the time of the hearing. *Id.* at 387.

In the case at bar, the experts and the reviewing board concluded that the petitioner continued to be sexually dangerous as defined by the statute. The experts and board drew

conclusions about his present state of mental health from all the evidence available to them, including the petitioner's refusal to be examined for the section nine hearing, his willingness to return, at least partially, to treatment, his progress in treatment prior to refusal, and his refusal to participate in treatment. Nonetheless, the hearing judge faulted the experts and found their testimony insufficient to establish beyond a reasonable doubt that Hill was currently an SDP. He based his conclusion on two related omissions: the experts were unable to adduce any examples of contemporaneous or recent conduct indicating sexual dangerousness, nor were their conclusions based on any other kind of recent evidence tending to show sexual dangerousness. Examples of recent conduct showing sexual dangerousness may often be lacking where the individual's dangerous disposition is of a sort that there will be no occasion for that disposition to manifest itself in a secure environment. And it cannot be the case that an individual's refusal to submit to examination or to participate in treatment, in which his current dispositions might manifest themselves, will more or less automatically guarantee himself a favorable determination. Yet this comes close to being what the hearing judge allows by his conclusion. That the subject refuses to cooperate, however, does not lighten the Commonwealth's burden, but the Commonwealth is free to make its case by such evidence as is available to it, distant and inferential as it may be. That is what the Commonwealth sought to do here. It extrapolated from earlier incidents which certainly did show dangerousness, and it carried the extrapolation to the present by considering whether as a general matter this type of dangerous disposition has a tendency to persist. The Commonwealth noted further that the treatment the petitioner refused is one way that this possibly persistent disposition might be lessened or turned in more positive directions. We cannot say that the inferences which the Commonwealth asks us to draw are unjustified or the evidence insufficient as a matter of law. Neither can we say, however, what the Superior Court judge would have decided had he considered this evidence in the way we now indicate.

Accordingly, we remand the case for a reevaluation of the evidence, and continue the stay of petitioner's release pending the outcome of such further proceedings.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CRIMINAL ACTION
NOS. 87-293
90-1852B

MICHAEL C. HILL
vs.
COMMONWEALTH

MEMORANDUM OF DECISION AND ORDER

The petitioner, Michael C. Hill ("Petitioner"), sought release from the treatment center for the sexually dangerous ("treatment center") pursuant to G.L. c. 123a, section 9. This court (Graham, J) granted the petition in May 1995, determining that the Commonwealth has failed to sustain its burden of proving beyond a reasonable doubt that the petitioner continued to be sexually dangerous. On appeal by the Commonwealth, the Supreme Judicial Court reversed this court's May 1995 determination and remanded the case for reevaluation of the evidence under the legal standards articulated in its decision. Hill, petitioner, 422 Mass. 147 (1985). For the reasons set forth below Hill's petition for discharge is DENIED.

BACKGROUND

In 1980, the petitioner pled guilty to rape, armed

assault in a dwelling, and assault by means of a dangerous weapon in 1980 and was sentenced to a maximum of fifteen years in prison. With respect to the rape conviction, the Superior Court held a G.L. c. 123A hearing, determined the petitioner to be a sexually dangerous person, and committed him to he treatment center for one day to life. In 1987 and 1990, the petitioner filed petitions for release pursuant to G. L. c. 123A, Section 9. The appeals were consolidated and heard before this Court during a two-day period in May of 1995.

This Court (Graham, J.) held that the Commonwealth had not carried the burden of establishing that the petitioner is currently a sexually dangerous person beyond a reasonably doubt, due to the lack of recent evidence of sexual dangerousness. The Commonwealth moved for reconsideration, and it was denied. The Commonwealth appealed under G.L. c. 231, Section 113 and the Supreme Judicial Court ultimately granted an application for direct appellate review. The Supreme Judicial Court held that this Court committed an error of law by requiring the Commonwealth to provide current psychiatric information about the petitioner's status. Hill, supra. The Supreme Judicial Court reversed the judgment of this Court and remanded the case to this Court for reevaluation of the evidence under
the legal standards articulated by the Supreme Judicial Court. Id.

The facts of the underlying offense and the

circumstances surrounding the petitioner's incarcerations in the treatment center for the sexually dangerous are stated in the findings of fact of this court's decision of May 1995, which this Court incorporates by reference.

DISCUSSION

A sexually dangerous person is defined as "any person ... whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by ... violence against any victim... and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires." G.L. c. 123A, Section 1. Under G. L. c. 123A, Section 9, a person adjudged to be sexually dangerous may petition for release from the treatment center every year, and at each hearing the Commonwealth must prove beyond a reasonable doubt that the person is still sexually dangerous. Commonwealth v. Travis, 372 Mass. 238, 248 (1977). The determination of sexual dangerousness rests with trier of fact, based on all the evidence, and may not be delegated to experts; psychiatric testimony may be probative of this matter but is not conclusive.

Commonwealth v. McHoul, 372 Mass. 11, 15-16 (1977).

At the May 1995 hearing, this Court held that the Commonwealth had failed to establish sexual dangerousness beyond a reasonable doubt. This Court

expresses concern that the evidence upon which the Commonwealth's experts based their opinions that the petitioner was presently sexually dangerous does not include any recent examples of conduct or other evidence tending to show sexual dangerousness. As the petitioner's counsel has noted, during his incarceration at the treatment center, the petitioner engaged in no conduct which even remotely suggests sexual dangerousness. The petitioner has been involved only in minor disciplinary infractions, has never demonstrated sexual aggressiveness towards other inmates, and has made no inappropriate sexual suggestions to female corrections officers and staff members.

On appeal, the Supreme Judicial Court held that such evidence was not necessary, and indicated that a finding of present sexual dangerousness could be properly "extrapolated from earlier incidents which certainly did show dangerousness... carried ... to the present by considering [that] this type of dangerous disposition has a tendency to persist." and noting further 'that the treatment the petitioner refused is one way that this possibly persistent disposition might be lessened or turned in more positive directions." Hill, supra at 157. According to the Supreme Judicial Court in Hill, this Court now holds that the Commonwealth has met its burden of establishing beyond a reasonable doubt that the petitioner remains a sexually dangerous person. While the absence of recent .conduct by the petitioner tending to show

sexual dangerousness warrants consideration, this Court finds that it is insufficient to rebut the inference of dangerousness which arises from the petitioner's past offenses and subsequent refusal to take part in treatment.

Accordingly, the petitioner's request for release from the treatment center for the sexually dangerous pursuant to G.L. c. 123A, Section 9 is DENIED.

ORDER

For the foregoing reasons, it is hereby ORDERED that the petitioner Michael C. Hill's petition for discharge from the treatment center for the sexually dangerous pursuant to G.L. c. 123A, Section 9 is DENIED.

R. Malcolm Graham
Justice of the Superior Court

DATED: June 8, 1996

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SUPREME COURT OF THE UNTIED STATES
OFFICE OF THE CLERK
WASHINGTON DC 20543-0001

William K. Suter
Clerk of Court

Area Code 202
479-3014

May 24, 1996

Ms. Joan C. Stanley
18 Tremont Street
Suite 601
Boston, MA 02108

Re: Petition of Hill
Application No. A-957

Dear Ms. Stanley:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter who on May 24, 1996, extended the time to and including July 22, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SOUTER, Clerk
By /s/ Ruth Jones
Ruth Jones
Assistant Clerk

RA 39